CITY OF DALLAS

March 29, 1996

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46 and In the Matter of Telephone Company-Cable Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266 (Terminated)

Dear Sir or Madam:

Enclosed herewith please find an original and ten copies of the Texas Cities' Comments in response to the Proposed Rulemaking in the above referenced matter. Please file stamp one copy. Should you have any questions, I may be contacted at (214) 670-3478.

Sincerely,

Scott Carlson

Scott Carlson
Assistant City Attorney
City of Dallas

On behalf of the Texas Cities

Enclosure

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Summary

The Texas Cities welcome the delivery of new video services to their communities. The Telecommunications Act of 1996 envisions cable operators and open video system operators as competitors, a goal the Texas Cities embrace. As the rules and regulations for these programming services to be provided by the open video system operator and others using the system are formulated, the Texas Cities urge the Commission to provide for enhanced competition and the development of new technologies. The Texas Cities also urge the Commission to remember the effect of new infrastructure and new systems on local communities, particularly the anticipated demands and uses of local rights-of-way by the promised new programmers and new technologies.

Table of Contents

Introduction	1
Discussion	
I. The Texas Cities believe that competition will be furthered by rules which treat both the OVS operator and unaffiliated programmers as equals.	3
II. The Texas Cities believe that competition through open video systems will be furthered by requiring the open video system provider to serve the public interest in meeting local community needs.	7
III. Texas Cities believe that competition through open video systems should be furthered by the certification process.	10
IV. The Texas Cities believe that competition through open video systems will be furthered with a recognition that open video systems will be required to obtain access to local, public rights-of-way.	12
V. The Texas Cities believe that competition through open video systems will be furthered through the payment of comparable fees.	16
Conclusion	18

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

In the Matter of	)	
	)	
Implementation of Section 302 of the	)	CS Docket No. 96-46
	)	
Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	
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In the Matter of	)	
	)	
Telephone Company-Cable	)	CC Docket No. 87-266
	)	(Terminated)
Television Cross-Ownership Rules,	)	
Sections 63.54-63.58	)	

COMMENTS OF THE CITIES OF DALLAS, TEXAS; DENTON, TEXAS; HOUSTON, TEXAS; PLANO, TEXAS; FORT WORTH, TEXAS; ARLINGTON, TEXAS; IRVING, TEXAS; LONGVIEW, TEXAS AND BROWNFIELD, TEXAS

The cities of: Dallas, Texas; Denton, Texas; Houston, Texas; Plano, Texas; Fort Worth, Texas; Arlington, Texas; Irving, Texas; Longview, Texas and Brownfield, Texas (hereafter collectively referred to as "the Texas Cities") file these comments in the above-captioned proceeding.

INTRODUCTION

The Federal Communications Commission ("the Commission") has requested comments on its proposed rulemaking with regard to rules and regulations concerning the establishment and operation of an open video system ("OVS") as described in the Telecommunications Act

of 1996 (the "Act").[1] In its Report and Order and Notice of Proposed Rulemaking In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46 and In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, CC Docket No. 87-266 (Terminated) (released March 11, 1996) ("NPRM"), the Commission recognized the de-regulatory and pro-competitive goals of the Act[2] and has discussed approaches to development and implementation of OVS with recognition of the time constraints set forth in the Act.[3] The Texas Cities eagerly anticipate the benefits to their citizens brought about by such technological advancement and the expected robust competition. To guarantee these benefits, the Texas Cities urge adoption of rules and regulations that create viable competition among existing and potential video providers, encourage the development of new technologies, and consider the effect of new infrastructure and new systems on local communities, with particular emphasis on the anticipated demands and uses of local rights-of-way by the promised new programmers and new technologies.

DISCUSSION

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[1] Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996. See §§ 651 and 653 for statutory framework of OVS.

[2] NPRM ¶2, ¶3 and ¶4.

[3] §653(b)(1) of the Act.

I. The Texas Cities believe that competition will be furthered by rules which treat both the OVS operator and unaffiliated programmers as equals.

A. To the extent that rules are formulated that favor the OVS operator (presumably the local exchange carrier) over other potential unaffiliated programmers, competition will be discouraged. The Commission's inclinations to permit an OVS operator's participation in the allocation of channel capacity,[4] use of excess capacity,[5] channel positioning,[6] establishing pricing mechanisms,[7] including the rates for charges for use of the system, and channel sharing[8] are opportunities for the OVS operator to preclude competition or to position itself more favorably than the competition. Avoiding this occurrence is a requirement under the Act.[9]

B. The OVS operator has added incentive for exercising any discretion and flexibility to its advantage, not only because it results in immediate revenues, but also because with fewer programmers, more channel capacity becomes available to itself or an affiliate. If an OVS operator is the only programmer on an OVS system, the distinction between an OVS

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[4] NPRM ¶11.

[5] NPRM ¶ 20 and ¶21.

[6] NPRM ¶22.

[7] NPRM ¶31.

[8] NPRM ¶ 37.

[9] § 653(b)(1)(A) of the Act.

operator and a cable operator vanishes. Thus, it could effectively operate like a "cable system" without meeting cable system provider requirements. Without truly independent and unaffiliated programmers on the OVS, there is no apparent difference between the OVS provider and the cable system provider.

C. To the extent that competition from other programmers is discouraged or hindered, the OVS operator becomes likely to be the only provider on the system. Because the Act gives the local exchange carrier four options of entering into the video programming marketplace, while keeping in place the regulations concerning cable operations, it is clear the Congress intended that competition should exist. If favorable treatment of an OVS operator is a significant detriment to the cable operator, then the OVS operator will become the sole provider of video programming and a monopoly is again established.

D. To avoid these undesirable consequences, the Commission should establish strong rules that favor channel utilization by multiple unaffiliated programmers, including any cable operator. Such an approach will truly lead to the intra-system competition envisioned by the Act and the Commission.[10] This becomes more important as time passes and, if the OVS is successful, unaffiliated programmers change and increase in numbers and demands. In the face of demand, no programmer should be allowed to monopolize the channel capacity. Because the unaffiliated programmer lacks bargaining power with the OVS operator, the Commission should favor rules which, at a minimum, establish equal rights to channel capacity, channel location, channel identification, information provided to the subscriber by

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[10] NPRM at ¶ 10.

the operator and favorable rates to encourage unaffiliated programmers. While making contracts with programmers public[11] promotes fair treatment among them, an additional step to ensure fairness is to require copies of the public contracts with independent programmers to be furnished to the Commission at the time of certification. To guarantee non-discriminatory treatment in the payment of rates and other matters, perhaps a "most favored nations" approach could be explored. Under this approach, if an OVS operator affiliate receives a more favorable rate, term or condition, then all similar, unaffiliated programmers would be entitled to the same rate. term or condition.

E. The Texas Cities propose that, at the time of certification, the OVS operator evidence the nondiscriminatory manner in which it has addressed these issues and complied with any applicable Commission regulations. This approach ensures limited Commission involvement, while giving a measure of control over these essential issues. Realizing that the Commission has only a short time in which to certify an application, any rules ultimately promulgated must be clear and unambiguous so that discrimination can be discerned within the time constraints of certification.

F. The Texas Cities question whether certifying a cable operator as an OVS provider furthers the pro-competitive thrust of the Act.[12] The OVS is intended to compete with cable

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[11] NPRM ¶ 34.

[12] Indeed, one rationale for the limitation on buyouts of cable and telephone systems set forth in § 652 of the Act supports the conclusion that Congress intended each to provide service.

systems. Hence, the changes in the definition of "effective competition"[13]. Congress constructed this competitive regime for a good reason in light of the competitive, deregulatory goal of the Act. The video programming offered by a cable operator on the OVS will compete with the video programming offered by other programmers, including presumably the OVS operator and its affiliates. The Commission points out in ¶ 10 of the NPRM:

> "Section 653 appears to promote the dual goals of both inner-system competition (i.e. between the open video system and other multichannel video programming distributors) and intra-system competition (i.e. among video programming providers on the open video system)."

Congress' intent as expressed in Subsection 653(a)(1) reflects this expression by the Commission. By limiting the cable operator involvement to the provision of video programming over the OVS, this intra-programmer competition is fostered and the competition between video providers is maintained so long as the cable operator remains a cable operator.

G. Cable operators in a particular franchise area should never be able to become an OVS operator in that same area.[14] Congress did not eliminate Title VI of the

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[13] § 301(b)(3) of the Act.

[14] Cf § 652 of the Act. Congress could simply have authorized the merger or buyout of cable systems by phone companies and *vice versa*. In this manner, Congress could easily have provided another method of access into the other's business. Congress instead chose to limit, with some exceptions, such buyouts. In doing so, Congress has evidenced its intention for one to compete with the other and this intention bears on the ability of a cable system to become an OVS operator. To allow a cable operator to become an OVS operator in essence provides an "end run" around these buyout restrictions, as well as an "end run" around the cable operator's franchise obligations.

Communications Act of 1934, as amended.[15] It has given the cable operator an option to also provide programming on an OVS, while giving local exchange carriers four choices to provide programming.[16] Clearly, as applied to a cable operator, the distinction between an OVS programmer and an OVS operator is intended and explicit[17] and the cable operator should be only an OVS programmer.

H. If the Commission were to decide to permit the cable operator to operate an OVS, then the cable operator's franchise obligations can not be nullified. The cable operator must continue to meet its franchise obligations or, alternatively, Commission approval of OVS service must be subject to the prior approval by the local franchising authority.

II. The Texas Cities believe that competition through open video systems will be furthered by requiring the open video system provider to serve public interest by meeting local community needs.

A. Public, educational, and governmental ("PEG") services, facilities, and equipment needs have been determined at both the federal and local levels to be in the public interest. Both OVS operators and cable operators assume obligations to serve the public interest.[18] The Act requires the OVS operator to serve the public interest through the provision of PEG

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[15] 47 U.S.C. § 521 et seq.

[16] § 651(a), S. 652, Telecommunications Act of 1996 Conference Report, H. Rep. 104-458 at 171,172 (January 31,1996) ("Conference Report").

[17] § 653(a)(1) of the Act.

[18] § 653(a)(1) of the Act and § 601(2),of the Communications of 1934, as amended, (47 U.S.C. § 521) respectively.

services, facilities and equipment.[19] The primary competitor of the OVS operator is the cable operator, which is required to meet local needs through the provision of PEG.[20] The Act requires that the Commission establish obligations on the OVS operator, which are "no greater or lesser" than those of the cable operator with regard to PEG.[21] Consequently, the OVS operator is required to assume PEG obligations equivalent to those assumed by the cable operator.

B. PEG requirements are by definition local in character and operation. For cable operators PEG requirements are contained in the negotiated franchise agreements with local governments. The Texas Cities urge the Commission to recognize, acknowledge and incorporate into its rules the expression of local public interest in PEG which is contained, in most areas, in the cable franchise. Congress specifically retained PEG requirements for OVS operators.[22] With this requirement in mind and the necessity to impose neither "greater or lesser" obligations on the OVS operator, additional PEG capacity, services, facilities and equipment should be required. Considering the Commission's goal of simplifying procedures,[23] and meeting the expeditious certification requirements, an OVS operator, at the

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[19] § 653(a)(1) of the Act.

[20] § 611 of the Communications Act of 1934, as amended 47 U.S.C. § 531.

[21] § 653(c)(2)(A) of the Act.

[22] § 653(c)(1)(B) of the Act, NPRM ¶ 19.

[23] NPRM ¶ 72.

time of certification, should demonstrate the means by which it will meet these PEG obligations.

C. The OVS operator must include PEG channels and facilities for all communities served within the system. Currently, its competitor, the cable operator, serves communities through franchises requiring differing PEG obligations, even though the facilities for the cable operator overlap jurisdictional boundaries. It is hard to understand how under the terms of the Act that an OVS operator should be allowed to provide less. Such a proposition appears on its face to be contrary to § 653(c)(2)(A). If the OVS operator evidences that it meets the PEG requirements of each community in a multi-jurisdictional area, then the PEG requirements are satisfied. Otherwise, consent of the pertinent jurisdictions to the PEG service proposed by the OVS operator should be provided at the time of certification. The Texas Cities endorse the "match or negotiate" proposal of the National League of Cities et. al.

D. The public interest is not met by "sharing" the PEG obligations of the cable operator.[24] Since it is unlikely that the average subscriber will subscribe to both competitors, a sharing of PEG obligations dilutes the services and public interest. Further, sharing automatically then reduces the existing obligations of the cable operator (in violation of the franchise), which was not the purpose of the open video option under the Act.

E. In deciding that the one-third allotment for the OVS operator did not include PEG channels, the Commission recognizes the importance of PEG and the need for all OVS

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[24] NPRM ¶ 57.

subscribers to have access to PEG channels and facilities.[25] This channel allocation is an obligation of the entire system and not readily attributable to any one of the programmers on the system. The PEG obligations are essential for each subscriber on any programming system.

F. Should the Commission give the OVS operator a choice in meeting PEG requirements, then each local community within the system must have the right to define another set of PEG requirements, which match the requirements of the cable operator. Since PEG obligations are based on a determination of local needs, the Commission is not in a position to assess and define the particular desires of each community. Thus, if the local exchange carrier chooses to become an OVS operator and not follow the cable operator's franchised PEG requirements, the OVS operator should make arrangements with each locality in which the system operates and present evidence of the agreements to the Commission at the time of certification.

III. Texas Cities believe that competition through open video systems should be furthered by the certification process.

A. Under the terms of § 653(a)(1)(b) of the Act the Commission has only 10 days to approve or disapprove any certification. Because of the potential number of interested parties and the brevity of time, it would be easiest for the Commission to require the OVS operator at the presentation of the certification to provide the Commission with evidence that 1) publication of the application in journals and trade publications of interest to potential

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[25] NPRM ¶ 19, ¶ 57 n. 74.

programmers, 2) all local franchising authorities have been notified, 3) agreements from all local franchising authorities that PEG requirements will be met, 4) fees to be paid pursuant to § 653(c)(2)(B) of the Act have been provided for and the authorization to use publicly-owned right-of-way has been obtained, 5) all programmers on the OVS will be treated non-discriminatorily, and 6) all cable operators within the proposed OVS area have been notified. Inclusion of this material will reduce the need for the Commission to attempt after the fact notification and is likely to provide any interested party notice in advance of the allotted ten day certification period. In addition, problems addressed prior to certification are more likely to be resolved satisfactorily on the local level and will eliminate or lessen Commission involvement.

B. For the Commission to certify, subject to a dispute resolution process,[26] which under the terms of the Act can take 180 days,[27] is manifestly unfair to any party whose interests should have been resolved prior to commencement of OVS operations. Certification with the intention of addressing problems through a 180 day dispute resolution process could also have repercussions on subscribers. In order to develop the OVS in as expeditious manner as possible, it is in the best interests of the Commission and all affected parties that as many issues as possible are clearly resolved prior to certification. If the issues are not resolved, the Commission should not issue certification.

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[26] NPRM ¶ 68.

[27] § 653(a)(2) of the Act.

C. Local communities are integral to the OVS certification process. The Act requires both PEG requirements[28], as previously discussed, and the payment of fees on the gross revenues of the operator.[29] To meet these conditions, local governments must be a part of the process. The Commission's apparent hypothesis,[30] however, presumes no franchise is necessary. When local communities are involved early in the process, the inherent, anti-competitive differences between an existing franchisee and an OVS operator can be resolved.

IV. The Texas Cities believe that competition through open video systems will be furthered with a recognition that open video systems will be required to obtain access to local, public rights-of-way.

A. The Act exempts the OVS operator from the requirement for a cable franchise.[31] Nothing in the Act, however, grants such an OVS operator a federal right to use local, public rights-of-way without the consent of a local government. Further, nothing in the Act preempts the authority of a local government with regard to the management of the right-of-way, and the legislative history clearly indicates an intent to maintain such authority.[32]

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[28] § 653(c)(2)(A) of the Act.

[29] § 653(c)(2)(B) of the Act.

[30] NPRM ¶ 6(2).

[31] § 653(c)(1)(C) of the Act.

[32] Conference Report at 178, "The conferees intend that an operator of an open video system under this part, shall be subject, to the extent permissible under state and local law, to the authority of a local government to manage its public rights of way in a nondiscriminatory and competitively neutral manner. *See also* § 101 of the Act creating §253(c) which expressly affirms the authority of local governments to manage the rights of way and collect compensation for their use in a competitively neutral and nondiscriminatory manner and stipulates that such conduct shall not be considered a

Similarly, Congress was careful to establish parity with cable operators as the objective in the payment of fees.[33] Failure to maintain parity discriminates against both the local community and the cable operator.

B. Access to the right-of-way is important to local government officials because they are directly responsible to the citizens for the right-of-way and assume their elected duties with that obligation. Telecommunications providers have no obligation to the electorate with regard to maintenance and acquisition of the right-of-way. This differing perspective is the outgrowth of the desire to protect and preserve the assets of the public. In fact, it would be foolish for the local government or its elected officials to intentionally hinder or obstruct the development of such services. The Texas Cities, as all local governments, must be attractive places for new businesses and developments. To the extent a community purposefully and with concerted intention hinders development of telecommunications services, that community is at a disadvantage with respect to other communities which welcome the new services. Mayors, councilmembers and city staff well understand that they will be held accountable by their communities for services that are desired but not delivered; for the promise of development and jobs which is never realized.

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barrier to entry.

[33] Conference Report at 178.

C. OVS access to the public right-of-way must be managed by local governments.[34] Otherwise the OVS operator, which does not have a grant to use public right-of-way, would be in conflict with all franchisees, such as water, telephone, gas, and competitive access provider facilities, as well as cable operators. The question of which has the right to use a scarce resource and can require the removal and relocation of the other's facilities will be constantly in issue with no immediate means of resolution. Because of the expectation of a large increase in infrastructure and technology,[35] each local community needs to assess its space availability and the methods of allocation. Each local community also needs to assess the method for ensuring that the right-of-way, which is expensive to acquire and maintain, will be available and will be used safely. Management includes, but is not limited to, a methodology to provide for multiple right-of-way users, notification to other users, insurance, bonding, construction safeguards and arbitration over disputes among the users.

D. No right of access to the right-of-way currently exists for an OVS, since it is a new statutory creation. By definition under the Act,[36] such an operator is not a common carrier, so that no existing franchisee has an existing franchise for an OVS. Without equality of rights and obligations for all users public right-of-way, the goals of encouraging

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[34] Conference Report at 176.

[35] NPRM ¶4.

[36] § 651(a) of the Act.

infrastructure development and technological achievement through competition will not occur.

E. Congress, as recently as 1992, recognized that developing telephone technology would likely place burdens on the right-of-way.[37] Congress concluded that technological changes were coming and envisioned wholesale upgrades of existing systems requiring substantial invasions of the right-of- way. Local governments must have some ability to manage this expected invasion of the right of way.

F. The provision of franchising authority in the Cable Act[38] recognizes the burden placed on the public right-of-way by cable companies. Likewise, any new regulations that anticipate use of public right-of-way by a new public service provider, such as OVS, which

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[37] The legislative history of the 1992 cable act anticipated additional development in the right of way.

> "Currently, the telephone company networks are incapable of carrying video signals to the home. The telephone industry, however, has plans to install optic fiber cable and new generations of switches and transmission equipment to create a broadband network which could transport many video signals. The telephone industry has already invested heavily in optic fiber cable for long distance transmission, major local routes and in some instances for service to large business. It will soon be economic to lay fiber optic cable to the home for the telephone lines instead of copper . It will be some time before it is economic to replace existing copper wire with fiber. However, some believe that time is not that far off."
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> Legislative History S.12, pg. 18
> Senate Report 102-92
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> *See also* pg. 52 of the Senate Report 102-92, "Like telephone, cable needs a franchise to string wires under or over the streets ..." Again on Pg. 51, the Report states, "...cable must be awarded a franchise in order to operate and, similar to the telephone system, it must use governmental property to string its wires, lay its cable in ducts and obtain the necessary rights of way."

[38] 47 U.S.C. § 521 et seq.

is likely to make substantial use of the right-of-way, should address the same concerns. Such regulations must place an emphasis on resolution of right-of-way issues at the local level.

V. The Texas Cities believe that competition through open video systems will be furthered through the payment of comparable fees.

A. Congress explicitly authorized fees on based on gross revenues in lieu of franchise fees equivalent to those paid by the cable operator ("fees") be paid by the OVS operator to all local communities served by the OVS operator.[39] Such fees are necessary to maintain a competitive balance between the OVS operator and the cable operator. Without such fees, a local government would be subsidizing the operations of an OVS operator.

B. For at least three policy reasons, the fees should reflect the programming provided by the OVS operator, its affiliates and unaffiliated programmers (except PEG programmers) to maintain a competitive environment.

> First, fees, which fail to reflect the unaffiliated programming, will frustrate competition with the cable operator. It is possible that all programming on the OVS will be provided solely by unaffiliated programmers. Absent inclusion of unaffiliated programmers in such a situation, no fees would be paid by those programmers competing with cable and the competitive parity with cable, which Congress intended, will be frustrated.[40]

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[39] § 653(c)(2)(B) of the Act.

[40] § 653(c)(2)(B) of the Act. Conference Report at 178.

Second, unless the fees reflect each of the programmers using the OVS, those programmers who are not represented in the fee structure, will receive a considerable competitive advantage *vis a vis* those programmers who are. As the Commission has stated, competition is intended to exist not just between the OVS and the cable operation but also between the programmers on the OVS.[41]

Third, like the OVS operator, the affiliated and unaffiliated programmers are beneficial users of the right-of-way. The fees should reflect this beneficial use. Absent a fee structure which includes all programmers on the OVS, the local government will effectively be subsidizing the operations of any affiliated or unaffiliated programmers not included in the fee structure.

C. In developing competitive parity, Congressional intent will be thwarted if the fees do not contain the services provided by all programmers. Congress intended that all cable services be subject to the "fees in lieu of."[42] All programming, whether delivered through the OVS operator, its affiliates or unaffiliated programmers, is delivered to subscribers directly by the respective programmer. All programming, whether delivered through the OVS operator, its affiliates or unaffiliated programmers, utilizes public right-of-way to reach the subscriber. If Congress had intended to exempt the unaffiliated programming or any other programming services from the fees structure, it could and would have done so. Instead,

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[41] NPRM ¶ 10.

[42] § 653(c)(2) of the Act.

Congress directed the development of a system which creates intra system competition, which does not favor one programmer over another and which does not so competitively disadvantage the cable operator so as to eliminate its existence from the competition.

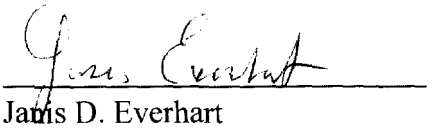
Conclusion

The Commission has recognized there are a great number of open video system issues that must be resolved in an expeditious manner in order to meet the all of the timetables set forth in the Act. The Texas Cities are eager to encourage and promote competition in video programming, which to date has primarily been monopolized by one video programmer, the cable operator. First, the Texas Cities urge the Commission to establish rules that protect and promote the unaffiliated programmer. Second, the Texas Cities urge the Commission to consider the needs of localities when deciding requirements with regard to PEG channels and facilities. The existing cable operator's requirements were negotiated with consideration of the local community interest being the highest priority. Third, the Texas Cities urge the Commission to involve the local communities early in the certification process and to require the OVS operator to provide documentation establishing a fair and reasonable resolution of the major competitive and local issues. Fourth, the Texas Cities urge the Commission to remember that an OVS system requires the use of local right-of-way. Finally, the Texas Cities urge the Commission to specifically and precisely provide for equivalent fees to be paid by the OVS operator.

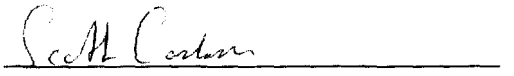
Local governments, including the Texas Cities, are anxious to see the benefits promised by the Act for their citizens. Just as a goal of the Act and the Commission is diversity and competition, the Texas Cities support vigorous competition in the

telecommunications marketplace and believe that the rules should be structured so as to support this objective.

Respectfully submitted,



James D. Everhart



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